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IN THE

Supreme Court of the United States

No. 1021

HARLAN F. LESTER,
Petitioner

versus

AETNA CASUALTY AND SURETY COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Harlan F. Lester, respectfully prays that a writ of certiorari do issue herein to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above case on January 25, 1957. Rehearing denied March 1, 1957.

CITATIONS TO OPINIONS BELOW

The District Court rendered a written opinion overruling plaintiff's motion for a new trial, printed in Appendix "B-1, infra, page 36, which was not reported.

The opinion of the Circuit Court of Appeals printed in Appendix "B-2", infra, page 38, is reported in 240 Fed. 2d. 676 (Advance Sheet, dated March 25, 1957). On March 1, 1957 the United States Court of Appeals for the Fifth Circuit entered an order, without written opinion, refusing a rehearing (Appendix "B-3", infra, page 47).

JURISDICTION

The judgment of the Court of Appeals was entered January 25, 1957 (R. 1342). Rehearing was denied, without written opinion, March 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The jurisdiction of the District Court, the Court of First Instance, was invoked under the provisions of 28 U.S.C. 1332 (a) (1).

QUESTIONS PRESENTED

(1) Whether or not an adult citizen of Louisiana, not mentally deranged and in control of his mental faculties may be deprived of his full freedom of exercising all of his faculties and, therefore, of his liberty, by subjecting him to a radical and dangerous medical procedure without informing him, personally, of the nature of that procedure and of the hazards and risks involved therein in the absence of any emergency constituting an immediate threat to the life of the patient or others.

(2) Whether or not a jury instruction which countenances, sanctions or approves such a deprivation operates as

a deprivation of the individual's right not to be peprived of his liberty (to freely contract or consent for himself) without due process of law in violation of, and repugnant to, the provisions of the fifth and fourteenth Amendments to the Constitution of the United States and of Article 1, Section 2 of the Constitution of Louisiana.

STATUTES INVOLVED

Articles 25, 31, 32, 1779, 1780, 1782, 1788, 1797, 1798, and 1819 of the Revised Civil Code of Louisiana of 1870, printed in Appendix "A-1, infra, page 26, Title 28, Sections 51 to 57, inclusive, Revised Statutes of Louisiana of 1950, printed in Appendix "A-2", infra, page 29.

STATEMENT

The original and amended complaints filed by plaintiff, petitioner herein, fully set forth the cause of action sued upon. (Record Volume 1, pages 1-14, 23-26). Reduced to brief narrative form the case may be stated as follows:

In the early spring of 1953 plaintiff became subject to a distressing and moderately severe state of insomnia for the relief of which he consulted a general practioner of medicine. After prescribing certain sedative medicines, mostly barbiturates of varying compounds, without attaining the desired results this physician suggested to plaintiff that he obtain "psychiatric help". In accordance with such suggestion plaintiff consulted Dr. Edith W.

Rigsby, a neuropsychiatrist, on April 14, 1953 and who, after one interview, instructed plaintiff to return the next day to begin treatment. The treatment actually administered consisted of electro shock treatments, also known variously as electro-convulsive treatments, etc. A total of five treatments were given to plaintiff, beginning on April 15, 1953 and repeated on April 17, April 20, April 22 and April 27, 1953. As a result of treatments plaintiff received multiple fractures, including in the left shoulder area "a complete fracture of the neck of the humerus extending through the greater tuberosity, same being a comminuted fracture involving the neck and head of the humerus with displacement of bone fragments"; in the right shoulder area an "incomplete fracture of the neck of the humerus" and in the back, "a compression fracture of the fifth dorsal vertebra, with approximately fifty per cent collapse."

Plaintiff sought recovery of damages under the Louisiana Direct Action Statute *(Title 22, Section 55 of the Revised Statutes of Louisiana of 1950)* against defendant, as Dr. Rigsby's insurer. Recovery was sought on two grounds:

1. Negligence on the part of the doctor in multiple respects, and

2. That there was no legal consent by plaintiff for the administration of the treatments, which are concededly quite dangerous.

After a lengthy trial the jury brought in a verdict for defendant. Plaintiff appealed to the United States

Circuit Court of Appeals solely on his objection to the charge of the District Court on the question of consent, (with certain alternative exceptions which are not involved here).

A statement of the points relied upon on appeal and the specification of error will be set forth hereinafter. At this point we should like to direct the court's attention to the specific allegations of plaintiff's original and amended complaints with respect to the question of want of legal consent, as follows:

From Original Complaint

Article 9.

"Accordingly, complainant, by previous appointment consulted the insured Dr. Edith W. Rigsby, who, after an interview of some thirty minutes, more or less, prescribed a course of treatments known as electric convulsion therapy, without, however, disclosing to complainant anything in respect to the nature thereof."

Article 10.

"Acting upon the advice of said insured and being totally ignorant of the radical and dangerous nature of electric convulsive therapy, also sometimes known as electric shock therapy as well as by the abbreviated term "ECT", complainant consented to the administration thereof and, accordingly, was instructed to appear at the offices of the insured the next day, to-wit: April 15, 1953."

(R. Vol. 1, pp. 3 and 4)

Article 18.

"All of complainant's said injuries and the damages resulting therefrom, as more particularly itemized hereinafter, were proximately caused by the negligence, want of professional care and skill on the part of the insured, and particularly in the following respects:

(c) In failing to advise complainant of her diagnosis of his condition and in failing to advise him of the radical and dangerous nature of the treatment prescribed, and in administering said treatment without so advising him."

(R. Vol. 1, pp. 6 & 7)

From Amended Complaint

Article II.

"Complainant substitutes the word "*acceded*" for the word "*consented*", contained in Article 10 of his original complaint so as to make said article read as follows:

> Acting upon the advice of said insured and being totally ignorant of the radical and dangerous nature of electric convulsive therapy, also sometimes known as electric shock therapy as well as the abbreviated term "ECT", complainant acceded to the administration thereof and, accordingly was instructed to appear at the offices of the insured the next day, to-wit: April 15, 1953".

(R. Vol. 1, pp. 23)

Article III.

"Complainant amends the first paragraph of Article 18 of his original complaint (preceding subparagraph (a) thereof) to read as follows:

> All of complainant's said injuries and the damages resulting therefrom, as more particularly itemized hereinafter, were proximately caused by the breach of professional duty, negligence, want of professional care and skill on the part of the insured, and particularly in the following respect:"

(R. Vol. 1, pp. 24)

Article IV.

"Complainant shows further:

(a) That the insured physician failed to disclose to him the nature or purport of her diagnosis of his condition.

(b) The insured failed, at any time prior to or during the period beginning April 14, 1953 and ending April 27, 1953, inclusive, to disclose to complainant that she intended to subject him to a course of treatments which were inherently dangerous to his life and to the physical structures of his body, or that such treatments were each designed to induce in him a convulsion of grand mal proportions, or that the effects of each of which might cause serious or even fatal consequences or complications, including fractures of the boney structures, and upon information and belief, that such concealment on the part of said insured was deliberate.

(c) That on April 22, 1953, the insured administered to complainant, for the fourth time, so-called electrical shock treatment without having disclosed to complainant, and continuing to conceal from him, that she intended to subject him to a treatment which was inherently dangerous to his life and to the physical structure of his body, or that such treatment was designed to cause him to undergo a convulsion, so that the effects of which might cause serious complications, including fractures of the bones of his body or other serious consequences, which concealment, upon information and belief, was deliberate.

(d) On April 27, 1953, the insured again administered to complainant, for the fifth time, a so-called electrical shock treatment, under the circumstances heretobefore alleged, without having disclosed to complainant, and continuing to conceal from him that she intended to subject him to a treatment which was inherently dangerous to his life and to the physical structure of his body, or that such treatment was designed to cause him to undergo a convulsion, or that the effects of which might cause serious consequences which concealment, upon information and belief, was deliberate; and that the insured further concealed from him the fact that the prior convulsion, which she had induced in complainant on April 22, 1953 or the convulsions induced prior thereto, might have caused serious injuries to him, including fractures of the bones in the areas as to which he had theretofore complained of severe pain.

(e) The insured further concealed from complainant that said treatments could have been administered with the aid of muscle relaxant drugs, including derivatives of curare designed to eliminate or substantially reduce the danger of fractures, and thereby deprived complainant of his right to select which danger, if either, he desired to undergo."

(R. Vol. 1, pp. 24, 25 and 26)

Article V.

"Complainant shows that had he been advised of the diagnosis which said insured made or had he been advised of the nature and dangers of the treatments actually administered he would not have acceded thereto, and would have refused to undergo same and that such treatments, and each of them, were administered to him *without his legal consent.*"

(R. Vol. 1, pp. 26)

STATEMENT OF POINTS RELIED UPON ON APPEAL AND SPECIFICATION OF ERROR:

I. The Court erred in instructing the Jury on the question of consent by plaintiff to submit to the treatment administered by defendants' assured.

II. The court erred in instructing the Jury that:

"While it is basic in Anglo-American law that in the ordinary situation *the patient in control of his mental faculties* himself must be fully advised and must give his consent to any operation or other medical procedure which might produce harmful

results, if you find from a preponderance of the evidence that it is commonly accepted, proper and preferable practice among qualified psychiatrists practicing in this or other similar localities, not to disclose the possibilities to the patient, that the matter be handled in such fashion, and if you further find that such a practice is reasonable generally and was reasonable in this case, and that an *adequate explanation* of the possible harmful results was given to *plaintiff's wife*, who consented for him, *then you may not find for plaintiff* on the grounds that there was no valid consent given to the administration of the shock treatments by Dr. Rigsby, and your verdict should be for defendant, unless liability otherwise established."

III. Under the court's charge to the jury on the question of consent, the jury was free to find as a matter of law, that plaintiff could be deprived of his liberty (to contract — to consent or refuse the proposed treatment actually rendered) without due process of law by a physician engaged in private practice, provided plaintiff's spouse consented to or joined in such deprivation *which charge* was erroneous and prejudicial, and *constitutes* an invasion of plaintiff's rights under the 5th and 14th Amendments to the Constitution of the United States and under Article I Section 2 of the Constitution of the State of Louisiana.

IV. The court erred in refusing to give the following instructions requested by plaintiff:

Instruction No. VI.

"I further charge you that it is the duty of a physician to inform his patient of the diagnosis and of the hazards and dangers involved where a drastic and dangerous treatment is proposed as a remedy, *in the absence of an emergency sufficiently great to endanger the life of the patient or others.*" *(Theodore vs. Ellis,* 75 So. 655, 141 La. 709; *Schoendorff vs. New York Hospital,* 211 NY 125; *Wall vs. Brim,* 138 Fed. 2d 478; *Hershey vs. Peake,* 223 P. 113.)

(R. Vol. 5, pp. 1275-1276)

Instruction No. VII.

A. "I further charge you that, under the law of Louisiana, a person over the age of twenty-one (21) is presumed to be sane and capable of managing his own affairs, including the right to make contracts, and that he cannot be deprived of this right except by due process of law."

(La. Revised Civil Code, Article 1782; Monroe vs. Ford, 164 La. 149, 113 So. 798)

B. "In this connection I further instruct you that the burden of proving insanity or incompetency rests upon the defendant, and that the fact of insanity or incompetency must be proved by a preponderance of the evidence and that, in considering that issue, you may consider all of the evidence relevant to that issue, including the testimony of lay or non-expert witnesses, as well as the opinion of expert witnesses."

C. "In considering the issue of insanity or incompetentcy, it is for you, and you alone, to weigh the evidence, giving such weight to the testimony of all the witnesses as you deem proper."

D. "I further charge you that, under the law of Louisiana, a wife may not legally consent to a contract for the medical treatment of an insane or mentally incompetent husband, unless she has been previously appointed as his curatrix (or guardian) by a court of competent jurisdiction."

(R. Vol. 5, 1276-1277)

Instruction No. VIII.

"I further charge you that any contract, including a contract by a patient for treatment by a physician, must be accompanied by the consent of the parties; that, by consent of the parties is meant an informed and an understanding consent; so that, in order to justify the administration of a dangerous treatment upon a patient, a physician must have the informed and understanding consent of his patient, free of misrepresentation or concealment of the dangers and hazards involved; otherwise, legal consent is lacking."

(La. Rev. Civil Code, Articles 1779, 1780, 1797, 1798;

Zotrell vs. Rapp, 153 NW 692; Theodore vs. Ellis, supra;

Citizens Bank & Trust Co. vs. Cook, 121 So 306;

Faulk vs. Hough, 14 La. Ann. 659;

Markey vs. Helimia Homestead Assn., 186 So. 757;

Adams vs. Ison, 249 SW 2d 791;

Hunter vs. Burroughs, 96 SE 360;

Paulsen vs. Gundersen, 260 NW 448;

Belli "Modern Trials" Vol. 3, Sec. 338, page 210)

(R. Vol. 5, pp. 1277)

Instruction No. IX.

"Therefore, I further charge you that, if you find as a fact that the physician in this case, Dr. Rigsby, did not inform Mr. Lester of what her diagnosis was or of the nature of the treatment which she proposed to administer, including the dangers and hazards thereof, or that she concealed the dangers and hazards of the treatment from Mr. Lester, it follows as a matter of law that he did not give his legal consent, unless you find from the evidence that he knew of the hazards and dangers involved in the treatment from other sources at the time he submitted to the treatment."

(See authorities submitted in support of instruction No. 8)

(R. Vol. 5, pp. 1278)

Instruction No. XI.

"I further charge you that the physician-patient relationship involves an element of trust and confidence and obligations of good faith require the physician to

make the fullest possible disclosures concerning risks of any proposed action which may result in injury to the patient; therefore, if you find as a fact that the insured physician in this case failed to make a full disclosure of the risks and dangers involved in the proposed treatment, you must find that she committed a breach of duty and thereby deprived plaintiff of his ability to give an enlightened consent, unless you also find from the evidence that the plaintiff knew the hazards and risks involved in the proposed treatment from other sources."

(Vol. 19 Tenn Law Review, 349, 350; Kinney vs. Lockwood Clinic, Ltd., 4 DLR 906 (Canada); Schoendorff vs. New York Hospital, 211 NY 125 105 NE 92.)

(R. Vol. 5, pp. 1279)

Instruction No. XII.

"I further charge you that every human being of adult years and sound mind has the right to determine what shall be done with his own body, and a surgeon who performs a dangerous operation without his patient's informed and enlightened consent commits an assault and battery for which the physician is liable in damages." (Schoendorff vs. New York Hospital, 211 NY 125, 105 NE 92)

(R. Vol. 5, pp. 1279)

The trial court's charge on the question of consent in full was as follows:

"Now as to the second ground of alleged liability, namely, that there was no valid consent given by plaintiff

or his wife to the performance of the electric shock treatments by Dr. Rigsby, because she allegedly failed to explain to him or his wife all of the possible harmful effects of such treatments, the general rule of law applicable to such contentions is as follows: Generally, and in the ordinary situation, an operation or other medical procedure cannot be performed without the patient's consent, and one performed without his consent, expressed or implied, is a technical battery or trespass for which the doctor is liable. If a physician advised his patient to submit to a particular operation or medical procedure and the patient weighs the dangers and results incident to its performance, after being fully advised by the doctor of the dangers inherent in the intended treatment, he being bound usually to so advise the patient, and the patient finally consents, the patient thereby in effect enters into a contract authorizing his physician to operate, or to conduct the medical procedure to the extent of the consent given, but no further. In such a situation, the physician may not perform an operation or other medical procedure different in kind from that consented to, or one involving risks and results not contemplated or explained to the patient. Ordinarily, if the physician does not obtain his patient's consent either expressed or implied, or if he goes beyond the consent given, either expressly or impliedly, the physician is liable for such conduct as constituting a technical battery or trespass, and for all of the results which follow proximately and directly from such trespass. There has been testimony in this case, however, tending to show that it is the

common, proper, accepted and preferable practice in psychiatric cases, particularly in those where the suicidal tendencies, for the psychiatrist not to explain to the patient all of the details as to the proposed electric shock treatment, or the possible harmful results thereof, because such explanation might result in the patient, already in a depressed and disturbed condition, being made worse or might even cause the consummation of such suicidal tendencies by his actually killing himself. This testimony further tends to show that in cases of this kind it is the common, proper, accepted and preferable practice for the psychiatrist who intends to administer such treatments to discuss the matter fully with a close relative of the patient, who may be expected to give the required consent for the patient, *who although not mentally deranged*, is in no condition to stand the impact of such information.

While it is basic in Anglo-American law that in the ordinary situation the patient *in control of his mental faculties* himself must be fully advised and *must give his consent to any operation* or other medical procedure which might produce harmful results, if you find from a preponderance of the evidence that it is a common accepted, proper and preferable practice among qualified psychiatrists practicing in this or other similar localities, not to disclose the possibilities to the patient, and that it is in the best interest of the patient that the matter be handled in such fashion, and if you further find that such a practice is reasonable generally and was reasonable in this case, and that an adequate explanation of the possible harmful results was given to plaintiff's wife, who con-

sented for him, then you may not find for the plaintiff on the ground that there was no valid consent given to the administration of the shock treatments by Dr. Rigsby, and your verdict should be for defendant, unless liability otherwise is established".

(R. Vol. 5, pp. 1311, 1312, 1313)

REASONS AND CONSIDERATIONS WHY THE WRIT SHOULD BE GRANTED

1. The Court of Appeals has decided an important state question in conflict with applicable state law, including statutory provisions, state decisions interpreting same and constitutional provisions, both state and federal.

2. The Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

ARGUMENT

1. In the case of *State ex rel. Monroe vs. Ford*, 164 La. 149, 113 So. 798, the Supreme Court of Louisiana held as follows:

> "Nevertheless, those who may be subject to the provisions of the Article (Article 31 of Louisiana Civil Code, Appendix A-1) *cannot be deprived of their legal rights otherwise than in the manner expressly pointed out by law.* The right of a mother to the custody of her child is one of the most important valuable rights known to the law. Conceding that

she may permanently divest herself by *contract* of her parental authority it is clear that she, or her duly authorized agent, must execute the contract; or if she be incapable of doing so, because of insanity or other cause, then, possibly, though we express no opinion to that effect, her duly appointed and qualified curator may sign in her behalf."

In the abstract, what the Supreme Court of Louisiana there held was that even an insane person cannot be deprived of his legal rights otherwise than in a manner expressly provided by statute. That is to say, by due process of law, and that, where consent is a necessary element, that consent can be given only by the person involved or by a duly appointed and qualified curator.

In the case of *Vance vs. Ellerbe*, 150 La. 388; 90 So., 735 (at page 740) the Louisiana Supreme Court held:

"We find, therefore, that the law provided then and has continued to do so until the present date, two separate proceedings with dealing with persons of unsound mind—the one for the restraining and confining of insane persons for their own and for the public protection, which is ex parte and in the name of the state; and the other dealing with the *civil and property rights* of such persons. One is informal, and need not be set aside after the patient recovers; while the *other is highly formal* and *requires all of the solemnities of contested judicial proceedings*, including a formal judgment, to restore civil rights after the mental derangement has ended." (Emphasis supplied)

Thus, what the court held there was that in order to deprive a person of his civil rights (which term includes necessarily the right of self-determination, the right to full freedom of action, and the right to be free in the enjoyment of all his faculties in all lawful ways), all of the highly formal solemnities of a contested judicial proceeding must be observed.

Neither the statutory law nor the jurisprudence of Louisiana contains any provision, nor any sanction, for depriving a person "not mentally deranged" and "in control of his mental faculties" of his civil rights.

In this case it cannot be overemphasized that, in charging the jury on the question of legal consent, the trial judge very carefully used phrases in reference to plaintiff that admitted of no other conclusion than that he was "not mentally deranged" and that he was "in control of his mental faculties". The jury in this case, under the charge as given, could draw no other inference than that under the law of Louisiana this doctor could submit her sane and mentally competent patient to a radical and dangerous medical procedure without informing him either of the nature of the diagnosis, the nature of the treatment proposed or the risks and hazards involved, provided his spouse was so informed and consented thereto, despite the absence of any emergency or other exception from the general and accepted rules referred to in the opinion of the Court of Appeals; (the trial judge likewise very deliberately refused to instruct the jury on the question of emergencies as an exception to the rule re-

quiring consent after full disclosure). This is in direct conflict with the statutory law of Louisiana, as exemplified by the Code Articles relied upon and printed in full in Appendix A-1, pages 29-31; with the decision of the Supreme Court of Louisiana in the leading case of *State ex rel. Monroe vs. Ford*, supra; with the policy of the law, as exemplified by the pertinent Sections of the Louisiana Mental Health Law printed, infra, in Appendix A-2; and with the due process clauses on both the federal and state constitutions.

Statutory Provisions and Jurisprudence:

Articles 25 and 1782 of the Revised Civil Code of Louisiana of 1870 read as follows:

> "Men and women are capable of all kinds of *engagements* and *functions* except where the law declares to the contrary and unless disqualified by reasons and causes applying to particular individuals. (Article 25, R. C. C.)"
>
> "ALL PERSONS have the capacity to contract except those whose incapacity is *specially declared by law.* (Article 1782, R. C. C.)"

Interpreting these Articles as far back as 1861, the Supreme Court of Louisiana held:

> "The general rule is that *all persons* are capable of contracting; the incapacity is the exception; and it should *not be extended beyond the clear import of the law." (Van Wickle vs. Matta, 16 La. Ann. 325).* Emphasis supplied).

and in *Pecquet vs. Pecquet's Executor, 17 La. Ann. 204,* the same Court enumerated these exceptions as follows:

> "All persons have the capability to contract except those whose incapacity is specially declared by law. These persons are persons of *insane mind*, slaves, those who are interdicted (interdiction may take place for reasons other than insanity), minors and married women". (Emphasis and parenthetic interpolation supplied).

Slavery having been abolished and the disability of married women having been removed, the only persons whose incapacity is now specially declared by law are the insane, minors and persons under interdiction. Thus, a person who is not mentally deranged and who is in possession of his mental faculties, as was the plaintiff here, clearly has the capacity and the sole right to contract (to consent) for himself.

That the relationship of patient and physician is a consensual relationship is so clear and so universally recognized by the courts of this country as to require no elaborate citation of authority. That is to say, with exception of emergencies wherein the life of the patient or others is imminently and seriously threatened and in certain cases of rendition of first aid, the consent of the patient must be obtained by the physician before he may proceed with treatment. Perhaps the leading case on this subject is *Schoendorff vs. New York Hospital,* 211 N. Y., 125; 105 N. E., 92, where the Supreme Court of New York, through the late Justice Cordoza, held:

"Every adult human being of sound mind has the right to determine what shall be done with respect to his own body."

Obviously, having the right to make such a determination it follows that the patient is entitled to be informed of what is proposed to be done for or to him, including the hazards and risks involved; otherwise he cannot really make the determination.

Louisiana Statutory provisions bearing on the question of consent are the following:

"R.C.C., Article 1779. Four requisites are necessary to the validity of a contract:

1. Parties legally capable of contract.
2. *Their consent legally given.*
3. A certain object, which forms the matter of agreement.
4. A lawful purpose."

"R.C.C., Article 1780. Those only are parties to a contract, who have given consent to it, either expressly or by implication."

"A.C.C., Article 1797. When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind can have no effect, unless it be evinced in some manner that shall *cause it to be understood* by the other parties to the contract. To prevent error in this essential point, the law establishes, by certain rules adapted to the nature of the contract, what circumstances shall be evi-

dence of such consent, and how those circumstances shall be proved; these come within the purview of the law of evidence."

"R.C.C. Article 1798. As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; *the will of both parties must unite* on the same point."

"R.C.C. 1819. Consent being the concurrence of intention in two or more persons, with regard to a matter *understood by all, reciprocally communicated*, and resulting in each party from a *free and deliberate exercise of the will*, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by: Error; Fraud; Violence; Threats." (Emphasis supplied).

From the above Articles it will be seen that where consent is a necessary element of the relationship involved, in a contract with a physician or otherwise, consent must be *legally given;* it must be an understanding consent and the will of the parties must unite on the same point.

In the case of an adult, he and he alone can give that consent unless:

1. He is insane.
2. He is under interdiction.
3. He himself conferred that power upon another through power of attorney (contract of mandate or other appointment of agency). *Van-*

wickle vs. Matta, supra; *Pecquets vs. Pecquet's Executor*, supra.

4. There exists a real and serious emergency constituting an imminent threat to his own life or to others.

In the case of a person of insane mind, consent can be given for him only by his curator, who must have been appointed and qualified after observation of all of the solemnities provided therefor; for sanity is presumed and the power and right of self-determination can not be divested except "in the manner expressly pointed out by law." *State ex rel. Monroe vs. Ford*, supra.

In the case of an adult under interdiction (for causes other than insanity) consent can be given only by his "duly appointed and qualified curator". *State ex rel. Monroe vs. Ford*, supra.

In the case of agency, agency must be proved, as in all cases of agency. (The defendant in this case did not plead agency vested in the wife and the charge to the jury did not contain any instructions in this regard (see charge in full, Record Vol. 5, pp. 1311-1313).

And, in the case of real and serious emergency no such defense was pleaded, no such exception was contained in the trial judge's charge and the trial judge specifically refused plaintiff's request for such a charge (Requested charge No. VI, Record Vol. 5, pp. 1275-6).

That the right of self-determination is one of the most fundamental, basic and precious rights which the

people of this nation enjoy has been recognized by this and other Federal courts on numerous occasions; for it is almost synonymous with liberty itself. Among the cases containing language recognizing this right are the following:

1. "Liberty" as used in the provision of the fourteenth amendment to the federal constitution, forbidding the states to deprive any person of life, liberty or property without due process of law includes, it seems, not merely the right of a person to be free from physical restraint, *but to be free in the enjoyment of all his faculties in all lawful ways;* to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into *all contracts which may be proper, necessary, and essential to carrying out the purposes above mentioned. Allgeyer v. State of Louisiana, 17 S. Ct. 427; 165 U.S. 578; 41 L. Ed. 832 reversing 1895, 18 So. 904, 48 La. Ann. 104.*

2. "The liberty guaranteed by the 14th Amendment to the Federal Constitution denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 US 390, 43 S Ct 625, 29 ALR 1446, 67 L ed 1042.

3. "The word "liberty" contained in that amendment embraces not only the right of a person to be free from physical restraint, but the *right to be free in the enjoyment of all his faculties as well.*" *Grosjean v. American Press Company, Inc., etal, 297 U.S., 233-251; 80 L. ed. 661-669 at page 665; 56 S. Ct. 444.* (Emphasis supplied).

Certainly, if a sovereign state of this union of states cannot adopt a statute whereby this fundamental right can be denied without due process of law, neither can a *federal judge* destroy and emasculate that right by instructing a jury that the law *requires it* if a doctor and another person, whether wife, brother or cousin, think it best. And this is particularly true in a field of medicine such as psychiatry, where the sum total of scientific knowledge is but a thimbleful out of an ocean of ignorance; in a field in respect of which the Congress of the United States has recognized and by solemn resolution has declared:

"Whereas, there seems to be *no overall body of knowledge* concerning the present status of our resources, methods, and *practices for diagnosing, treating,* caring for and rehabilitating the mentally ill, although *only through the development* of such a body of knowledge can the people of the United States ascertain the *true nature* of this staggering problem and develop more effective plans to meet it." *(Mental Health Study Act of 1955, Chapter 417; Public Law 182; Laws of the 84th Congress, First Session, Vol. 1, page 420, U. S. Code Congressional and Administrative News, Legislative His-*

tory Vol. 2, page 2530, U. S. Code Congressional and Administrative News.) (Emphasis supplied).

Policy of the Law—Louisiana Mental Health Law—Appendix A-2, pp. 32-35, infra.

Section 51 of the Louisiana Mental Health Law deals with voluntary admission, and provides that even in the case of a person who recognizes himself to be mentally ill and in need of treatment and desires to submit himself for that purpose, must submit:

(a) A written application, duly witnessed.

(b) He *must be fully informed* of the provisions of the mental health law, and must fully understand them.

(c) He must present a certificate of a doctor that he is mentally ill.

(d) He must personally present his application.

The court will thus note the scrupulous care with which the Legislature of Louisiana has regarded the question of consent, informed consent, in dealing, even in the case of a state operated institution, with a case where the individual himself presents the application for treatment voluntarily. Even the sovereign itself has placed upon itself a limitation upon its right to give treatment to a mentally ill person unless that mentally ill person fully consents after being fully informed of what his consent means and the superintendent of the particular institution to which application for admission for treatment is made must believe, before admitting the patient, that

the patient is mentally competent to make the application and is in need of the care.

Section 52 of the Mental Health Law deals with the so-called coroner's committment. Under the provisions of this section the application may be made by any *responsible* person, which, we assume, does not exclude psychiatrists. Under this procedure the coroner and one other qualified physician must certify:

(a) That they have examined the patient and that he is in need of care (the word "Care" is defined to include treatment, Section 2, subparagraph (10) of R. S. Title 28 reading as follows: "care" includes reception, detention, custody, *treatment*, maintenance, support, segregation, education, culture, training, discipline, improvement, occupation, employment, *medicine*, *surgery*, nursing, food, and clothing.")

(b) The coroner and the physician must certify to the facts and sources of information and personal observation upon which their opinion is based. Clearly, this means that they must state the existence of facts from which a diagnosis of mental illness is warranted.

(c) They (the coroner and the physician) must certify that they are NOT RELATED by blood or MARRIAGE to the patient. (Emphasis supplied).

Here, again, we find embodied in the positive law of Louisiana, the scrupulous care with which the sovereign deals with the rights of and lends its protection to the

individual; first, it does not ASSUME mental or emotional disorder merely because some *one* doctor affirms it; second, it affirmatively DISTRUSTS well-meaning relatives, as well as recognizing that motives of relatives *and* doctors are not always wholly admirable; thirdly, it simply does not tolerate the subjection of its citizens to the stigma, however unjustified, of such a diagnosis, nor to the many hazards and risks involved in the treatment of these disorders, unless upon the independent, dispassionate and *financially disinterested* testimony of at least two doctors; and even this procedure is further subject to the safeguards, to which the individual is entitled as a presumptively "moral being", provided for in Section 56.

Section 53 deals with judicial committment. The judge is given the power to commit, with or without hearing; but in the latter event he may only commit the individual to an institution for a limited period of observation. Again this committment may not be pronounced except where it is accompanied by a certificate identical with that provided for in Section 52.

Sections 54 and 55 deal with the procedure to be employed by the court following the proceedings authorized in Section 53. Again it must be noted that great emphasis is placed upon the right of the individual, not to be "railroaded" into confinement for the purpose of treatment which may be both unnecessary and deleterious. Again it must be noted that the sovereign has imposed upon itself rigid limitations upon its own authority. Can it be said

that it is the policy of the same sovereign to countenance the exercise of unlimited authority by a private practitioner of psychiatry who has succeeded in securing the unauthorized consent of a spouse?

Passing for the moment, the provisions of Section 56, to which we will presently revert, we note that Section 57 deals with emergency committment.

Any relative, etc., may apply "for the emergency committment of a mentally ill person *needing immediate care*", and we remind the court that the term "care", by definition, includes treatment. In emergencies the application may bear the certificate of only one qualified physician, which still must state the reasons why immediate care is needed and in other respects must conform to the requirements of certificats under Section 52 including the certificate of non-relationship by blood or marriage.

The provisions of this Section, together with those of Sections 51 and 55, inclusive, render completely invalid, as a legal proposition, the argument that a psychiatrist is justified in concealing from his patient the hazards and risks involved in a proposed radical treatment for fear that the patient may refuse the treatment or may commit suicide or commit murder or any number of things that mentally or emotionally disturbed persons might, but in the vast majority of cases don't, do. For if, after informing his patient of the risks and hazards of a proposed dangerous treatment (not limited merely to electro-

shock therapy) the patient refuses to submit to the treatment or, in fact, appears likely to commit suicide or other violent action, the doctor has open any one or more of the above courses which he may advise the patient's family to pursue.

Reverting now to the provisions of Section 56 we note that it is provided that:

> "Any person committed without a hearing in accordance with Sections 51, 52, 53 or 57 shall be entitled to a hearing UPON DEMAND."

What is this but to say, by solemn declaration of legislative will, that none of these things can be done to an adult human being without his formal and enlightened consent, except by due process of law—a hearing before a court of competent jurisdiction?

These rights, be it remembered, are the rights of *every* citizen, including even those *manifestly insane*. Certainly the rights of a person "not mentally deranged" and "in full control of his mental faculties" cannot be less. And, certainly, a Federal Judge cannot by interpretation in the form of a jury instruction, infringe upon or deny those rights to a citizen of Louisiana.

Opinion of the Court of Appeals:

In the first paragraph on page 8 of the opinion of the court of appeals (Transcript of Record, Vol. 5, page 1349) the court says:

> "The basic, the fundamental, difficulty which confronts plaintiff on this appeal is that he presents his case as though it were one of a person being *deprived by another* of due process of law, instead of grounding it upon the well settled principles," etc. (Emphasis supplied).

Apart from other considerations, it is submitted that this is a completely erroneous interpretation of the grounds upon which the appeal was taken. In plaintiff's statements of points relied upon he used the following language:

> "III. Under the courts charge to the jury on the question of consent, the jury was free to find as a matter of law that plaintiff could be deprived of his rights (to contract—to consent or refuse the proposed treatment actually rendered) without due process of law by a physician engaged in private practice provided plaintiff's spouse consented to or joined in such deprivation, *which charge* was erroneous and prejudicial, and *constitutes an invasion* of plaintiff's rights under the 14th and 5th Amendments of the Constitution of the United States and under Article I, Section 2, of the Constitution of the State of Louisiana." (Emphasis supplied).

It should be noted that plaintiff's complaint was with the charge of the court and that it was the charge that plaintiff complained of as constituting an invasion of his rights under the constitutional provisions mentioned.

In short, it was plaintiff's argument that the court gave an unconstitutional interpretation of the law of Lou-

isiana in its charge on consent and not primarily that the conduct of the doctor deprived plaintiff of due process. In fact, at the very outset of plaintiff's argument in his brief filed in the Court of Appeals it was said:

> "Let us here pause to make one thing clear. We are aware that the fifth amendment of the United States of America places its restrictions upon the government of the United States of America and not directly upon the actions of one citizen toward another; also that the fourteenth amendment places its restrictions upon the state government and not directly upon the actions of private citizens inter se. The same is probably true of the due process clause of the Constitution of Louisiana." (See page 2 of plaintiff's brief in support of his petition for re-hearing, 10 copies of which have been forwarded to this Court, along with the certified copy of transcript of the record on appeal).

Beginning with the last paragraph on page 6 of the opinion of the Court of Appeals (Transcript of Record, Vol. 5, pages 1347-1348) the Court says:

> "Assuming, as we must in support of the verdict and judgment, that plaintiff's condition was such as to require neuro-psychiatric treatment and, *in the judgment of his physician and his wife*, to make it unsafe and unwise to require him to undergo the strain and shock of discussing and considering the possible, though not probable, hazards involved in, and making a decision as to, whether in view thereof the electro-convulsive or electro-shock treatments prescribed for, should be administered to him; that, *in the judgment of his physician and his family* it was desirable, indeed necessary that they be ad-

> ministered; and that his wife, being advised of and fully comprehending the situation, added to his consent already given her consent to the administration of the treatments, we are bound to hold that if further consent than that already given by plaintiff to their administration was needed, the wife could and did give sufficient legal consent, and that giving the complained of charge and refusing the requested charges was not prejudicial error." (Emphasis supplied).

This passage from the opinion of the Court of Appeals overlooks entirely the fact that the charge complained of was given in reference to a person sui juris, "not mentally deranged" and "in possession of his mental faculties".

It was plaintiff's contention, supported by the statutory provisions and jurisprudence heretofore quoted that the judgment of a physician and a member of the patient's family *cannot be substituted* for the judgment of the patient himself, where that patient is not mentally deranged and is in possession of his mental faculties, however desirable that might be from a medical standpoint. For the right "to be free in the enjoyment of all of his faculties in all lawful ways" is a civil right of which a citizen may not be deprived except "in the manner expressly pointed out by law." *Allgeyer v. State of Louisiana*, supra; *State ex rel Monroe v. Ford*, supra.

The charge here complained of not only sanctioned such a denial of that civil right, but actually required the jury to sanction it and this we submit, amounted to an unconstitutional interpretation of the law of Louisiana.

Again, in the last paragraph on page 7 of the Opinion of the Court of Appeals (Transcript of Record, page 1348) the Court says:

> "Appellant, himself recognizing the place, the responsibility, and the authority of a man's wife in familiar situations of this kind, pleaded that complainant's injuries were the result of the negligence and want of proper skill and care on the part of the insured '*** and (d) and in failing to advise plaintiff's wife of the radical and dangerous nature of the prescribed treatment and in administering same without so advising her', etc."

The Court of Appeals has misinterpreted the purpose of the allegations that plaintiff's wife was not advised of the hazards and risks of the proposed treatment. At the time the original petition was drawn it could not be foreseen that defendant would not plead the existence of an emergency and that under such circumstances the wife could consent for the husband, provided she was advised of the risks and dangers involved. Nor could it be foreseen that defendant would not contend that plaintiff knew of the dangers and risks involved from other sources, including his wife. It was in anticipation of these possible defenses, solely, that plaintiff made the allegation, supported by sworn testimony of his wife, that she was not so advised. It did not in any manner involve the recognition of any authority of a man's wife in situations of this kind. Since no such authority exists in law it could not be recognized.

2. It is respectfully submitted that the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

In its opinion (second paragraph, page 6; Transcript of Record page 1347) the Court says:

> "As appellant correctly points out in his brief, his specifications of error upon the refusal of requested instructions are not intended to add to or enlarge upon his primary specifications 1, 2 and 3, dealing with the complained of error in the general charge. They are put forward to point up and emphasize by their particularization the error generally relied on, and it will not be necessary for us to, we will not, deal separately with them. It will be sufficient to say of them that the determination in favor of, or against, appellant of his primary grounds of error necessarily determined against him these subordinate and illustrative grounds."

The Court of Appeals in this case restricted its consideration of the issue entirely to the question of whether or not plaintiff had been *deprived by another* of due process of law. (See next to last paragraph on page 8 of Opinion of Court of Appeals; Transcript of Record page 1549). The statement of points relied upon were sufficiently broad to include for consideration of the Court the subsidiary questions raised by plaintiff's objections to the trial court's refusal to give requested instructions numbers VI, VII, A. B. C. and D., VIII, IX, XI and XII. (Transcript of Record, pages 1275-1279, incl.)

The statement of points is provided for in Rule 75 (d) of the Federal Rules of Civil Procedure. This rule reads as follows:

> "No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action he shall serve with his designation a concise statement of the points on which he intends to rely upon appeal."

This is analogous to the provision of Rule 23 (1c) of the Rules of this Court reading as follows:

> "The questions for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include *every subsidiary question fairly comprised therein.* Only the question set forth in the petition or fairly comprised therein will be considered by the Court." (Emphasis supplied).

It is respectfully submitted that the questions raised by plaintiff's objections to the failure of District Court to give requested charges VI, VII, A. B. C. & D., VIII, IX, XI and XII, were fairly comprised in his Statement of Points on Appeal and that such statement was sufficiently broad to include every subsidiary question raised by such requested instructions and that the Court of Appeals was not justified in refusing to consider the questions thereby raised. As a matter of fact, the Court of Appeals not only did not consider the questions raised by these requested charges separately, but failed to give

any consideration to their effect on the question as a whole as raised by the statement of points relied upon.

As we interpret the judgment of the Court of Appeals, it has not explicitly approved the charge on consent as given by the trial court, but rejected plaintiff's appeal solely on the ground that his method of attacking the charge involved was at fault. Be that as it may, the charge as actually given will stand as a model for future charges to the effect that where the condition of the patient, in the judgment of the doctor and a member of the patient's family, is such as to make it unwise for the patient to exercise his own judgment although perfectly sane and in control of his mental faculties, the physician need not secure the consent of the patient before proceeding to perform a dangerous medical procedure upon him. Such expressions in the literature of our jurisprudence tend to become formulas. As stated by Mr. Justice Frankfurter in his concurring opinion in *Tiller v. Atlantic Coastline Railroad Company, 318 U.S. 54-73; 87 L. ed. 610; 63 S. Ct. 444:*

> "The phrase 'assumtion of risks' is an excellent illustration of the extent to which uncritical use of words bedivils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition and *repetition soon establishes it as a legal formula* undiscriminatingly used to express different and sometimes contradictory ideas." (Emphasis supplied).

So also a charge such as the one here complained of if allowed to stand, and to be repeated in other cases

hereafter, would soon establish the legal formula that the judgment of the doctor shall prevail over the judgment of the patient as to whether the patient shall be told what the doctor proposes to do with the patient's body.

We respectfully submit that this is a very wide departure from the jurisprudence, recognized by the Court of Appeals, and constitutes a threat to the well settled principles heretofore recognized throughout this country in the matter of consent by a patient to undergo the hazards of dangerous medical procedures.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Honorable Court grant this petition for certiorari and that in the re-trial of the case the District Court be required to properly charge the jury on the question of consent.

Respectfully submitted,

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APPENDIX A-1

Revised Civil Code Articles

Art. 25. Men and Women

Art. 25. Men and women are capable of all kinds of engagements and functions, except where the law declares to the contrary, and unless disqualified by reasons and causes applying to particular individuals. (as amended Acts 1921, Ex. Sess., No. 33)

Art. 31. Insane Persons

Art. 31. Persons of insane mind are those who do not enjoy the exercise and use of reason, after they have arrived at the age at which they ought, according to nature, to possess it, whether the defect results from nature or accident. This defect disqualifies those who are subject to it, from contracting any species of engagements, or from managing their own estates, which are for this reason placed under the direction of curators.

Art. 32. Incompetence.

Art. 32. Persons, who, by reason of infirmities are incapable of managing their own affairs, have their persons and estates placed under the direction of curators.

Art. 1779. Requisites for validity of contract.

Art. 1779. Four requisites are necessary to the validity of a contract:

1. Parties legally capable of contracting.
2. Their consent legally given.
3. A certain object, which forms the matter of agreement.
4. A lawful purpose.

Art. 1780. Parties to contract, consent necessary.

Art. 1780. Those only are parties to a contract, who have given their consent to it, either expressly or by implication.

Art. 1782. Capacity to contract.

Art. 1782. All persons have the capacity to contract, except those whose incapacity is specially declared by law. (As amended by Acts 1924, No. 45).

Art. 1788. Insane persons, proof of incapacity.

Art. 1788. The contract, entered into by a person of insane mind, is void as to him for the want of that consent, which none but persons in possession of their mental faculties can give. It is not the judgment of interdiction, therefore, that creates the incapacity, it is evidence only of its existence, but it is conclusive evidence, and from these principles result the following rules:

1. That, after the interdiction, no other evidence than the interdiction itself is necessary to prove the incapacity of the person, and to invalidate any contract he may have made after the day the petition for interdiction was presented, and that no evidence to show that the act was made during a lucid interval, or to contradict the judgment of interdiction, can be admitted.

2. As to contract, made prior to the application for the interdiction they can only be invalidated by proving the incapacity to have existed at the time the contracts were made.

3. But in order to prevent imposition, it is not enough to make, the proof mentioned in the last rule; it must also, in that case, be shown that the person interdict-

ed was known by those who generally saw and conversed with him, to be in a state of mental derangement, or that the person who contracted with him, from that or other circumstances, was acquainted with his incapacity.

4. That, except in the case of death hereafter provided for, no suit can be brought, nor any exception made, to invalidate a contract on account of insanity, unless judgment of interdiction be pronounced before bringing the suit, or at least applied for before making the exception.

5. That if the party die within thirty days after making the act or contract, the insanity may be shown by evidence, without having applied for the interdiction; but if more than that time elapse, the insanity can not be shown to invalidate the act or contract, unless the interdiction shall have been applied for, except in the case provided for in the following rule.

6. That if an instrument or other act of a person deceased shall contain in itself evidence of insanity in the party, then it shall be declared void, although more than thirty days have elapsed between the time of making the act and the death of the party, and although no petition shall have been presented for his interdiction.

7. In the case mentioned in the preceding rule, other proofs of insanity may be offered by the party who alleges the incapacity, or may be required by the judge.

8. That where insanity is alleged to avoid a donation or other gratuitous contract, it is not necessary to show that the incapacity was generally known; it will be sufficient to show that it existed, and if the party be dead, without having been interdicted, it is not necessary in this case to show that the interdiction was applied for.

9. That evidence of general and habitual insanity, in order to avoid a contract, may be rebutted by showing that the contract or act was made during a lucid interval; but where general insanity, even with some intervals, is shown, the burden of showing that the particular act in dispute was made during such an interval, is thrown on the party who supports the validity of the act or contract.

10. That insanity may be alleged and proved to invalidate a testament, although no interdiction have been applied for, nor in that case is it necessary to prove that the insanity was notorious.

11. The allegation in a testament that the testator was of sound mind, cannot prevent proof of the contrary being given in evidence, even by the witnesses to the will.

12. That, when these rules refer to the time of presenting the petition for interdiction, as a period which is to determine the validity of a contract or other act, such petition is meant as has not been withdrawn or dismissed.

13. That, while the judgment of interdiction is in force, it is conclusive evidence of incapacity; but that it may be annulled, whenever the insanity ceases, but it can only be annulled by a judgment.

Art. 1797. Necessity for consent; proof

Art. 1797. When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind, can have no effect, unless it be evinced in some manner that shall cause it to be understood by the other parties of the contract. To prevent error in this essential point, the law establishes, by certain rules adapted to the nature of the contract, what circumstances shall be evidence of

such consent, and how those circumstances shall be proved; these come within the purview of the law of evidence.

Art. 1798. Offer and acceptance

Art. 1798. As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point.

Art. 1819. Consent; facts vitiating consent

Art. 1819. Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, recriprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by:

Error;
Fraud;
Violence;
Threats.

APPENDIX A-2

SECTIONS 51 THROUGH 57, TITLE 28 (MENTAL HEALTH) LOUISIANA REVISED STATUTES.

PART III. EXAMINATION, ADMISSION, COMMITMENT AND DETENTION OF MENTAL PATIENTS.

51. Voluntary Admission

Any mentally ill, inebriate, or epileptic person who desires to submit himself for treatment may apply to the superintendent for admission to the appropriate institution named in Part II of this Chapter, provided he is first fully informed of the provisions of this Chapter, fully understands them, and agrees to obey the rules of the institution.

The application shall be in writing, signed by the applicant and one competent witness, and accompained by a certificate of a qualified physician stating that the applicant is mentally ill, inebriate, or epileptic and is free from and to the best of his knowledge had not recently been exposed to any infectious, contagious, or communicable disease. The applicant shall personally present the application and certificate to the superintendent.

The superintendent may receive and detain the applicant, provided he believes him mentally competent to make the application and to be in need of care.

§ 52. Coroner's Commitment

Any near relative, or in the absence of relatives, a near friend, curator, or other responsible person may apply to the superintendent to have a patient committed to an institution.

The appliction shall be in writing on the form prescribed by the department and shall give the name, sex and residence of the patient, the reason why institutional care is needed, and any other information the department deems necessary. It shall be accompanied by a certificate of the coroner and one other qualified physician stating that they have examined the patient within three days of the application and that he is in need of observation or care in an institution. The certificate shall state the facts and source of information and personal observations upon which opinion is based. The coroner and the physician shall certify that they are not related by blood or marriage to the patient or to the applicant and that they are not connected except in a professional capacity, with the institution to which the patient is to be committed.

The superintendent may admit the patient to the institution not longer than fourteen days from the date of the examination by the coroner and the physician.

§ 53. Judicial Commitment

Upon application by any responsible person, accompanied by a certificate as provided in R. S. 28:52 the judge of the civil district court may commit to an institution any patient within his jurisdiction, when, in his opinion, commitment is in the best interest of the patient and of the community.

To assist him in disposing of the application, the judge may request the presence of the patient or commit him to an institution for a limited period of observation. Prior to the termination of this period, the superintendent shall report the institution's findings to the judge for further disposition of the application.

Pending disposition of the application, the patient may not be detained, except in emergency, in any place provided for the detention of persons charged with or convicted of an offense.

In the case of children within the jurisdiction of the juvenile court, proceedings shall be exclusively before the judge of the juvenile court.

§ 54. Commission to inquire into the facts

The judge may appoint a commission composed of the coroner and one or two other qualified physicians to hear the evidence, take statements, examine the patient, and render to the court a full report of its findings and the reasons therefor. The commission may summon witnesses and compel their attendance.

§ 55. Report of the commission; hearing

Upon receiving the report of the commission, which shall be made within thirty days after its appointment, the judge shall hold a hearing at which the patient shall be summoned to appear. If, as a result of the report and of the hearing, the judge believes that the patient should be committed, he shall issue an order of commitment. A certified copy of this order shall be sent to the superintendent of the institution to which the patient is to be committed.

§ 56. Right to hearing

Any person committed without a hearing in accordance with R. S. 28:51, 28:53, or 28.57, shall be entitled to a hearing upon demand. To this end, he shall present to the judge a petition requesting a hearing and the appointment of a commission, as provided in R. S.

28:54 and 28:55. All proceedings under this Chapter shall be by summary process.

§ 57. Emergency Commitment

Any relative, friend, or curator may apply to the superintendent of a mental hospital for the emergency commitment of a mentally ill person needing immediate care.

The application shall be in writing and shall be accompanied by a certificate of a qualified physician stating that the patient requires immediate care in a mental hospital. The certificate shall state why it is necessary that the patient be received immediately and shall bear the date and exact time of examination by the physician. In other respects it shall conform to the requirements for certificates as provided in R. S. 28:52. This certificate shall not be valid for longer than twenty-four hours.

The superintendent may admit the patient to the hospital for a period of observation not to exceed thirty days. During that time, he should decide whether the patient should be released or commited, but upon the request of the superintendent, the judge or the coroner may continue the period for whatever additional time the superintendent deems necessary to reach a decision. If the superintendent decides that the patient should not be committed, he shall release him, but if he decides that the patient should be committed, the judge or the coroner may continue the period of observation or emergency commitment until the application for commitment under R. S. 28:52 or 28:53 is disposed of.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

• • • • • • • • • • • • • • • •

CIVIL ACTION NO. 4373

HARLAN F. LESTER

VS.

AETNA CASUALTY & SURETY COMPANY

• • • • • • • • • • • • • • • •

FOR PLAINTIFF MESSRS,
Thomas M. Comegys,
Ricou-Brewster Building
Shreveport, Louisiana

FOR DEFENDANT Lunn, Irion, Switzer, Trichel and Johnson,
Slattery Building
Shreveport, Louisiana

• • • • • • • • • • • • • • • •

DAWKINS, JR. CHIEF JUDGE

RULING ON MOTION FOR NEW TRIAL

We have studied carefully the respective briefs, and authorities cited, and have reviewed again our charge to the jury, particularly that part to which plaintiff excepted.

It is our conclusion that the charge fairly stated the law in this type of case. Obivously, the jury dis-

believed plaintiff, in his claim that the doctor told him she was going to administer "lecture" treatments, and believed the doctor's testimony that she told him she would give him electric shock treatments.

The jury must have found, therefore, that plaintiff consented to the treatments, expressly or impliedly, and that because of the great danger of his committing suicide, his wife properly was the one to receive explanation of the possibly harmful results.

We think the jury correctly found, accordingly, that the doctor's course of action not only was reasonable and proper under the circumstances, but that she could not have done otherwise without subjecting her patient to a likely leap from the Red River Bridge. Besides, the impressive testimony of Dr. Holbrook clearly showed that fractures were only remotely possible and not at all likely.

In the final analysis, what plaintiff's counsel would have us hold, as the law on this subject, is unreasonable and contrary to the precepts of modern medicine, arrived at from long experience and representing the best judgment of conscientious physicians dedicated alleviating the most exquisite form of human suffering -- an acute mental depression.

We cannot believe the law is that way, and this Court will not hold that way, unless required to do so

by higher authority. Freedom to contract is one thing—and freedom to be pushed into suicide is quite another. In our opinion the latter is not included in the lexicon of constitutional rights.

For these reasons, the motion for a new trial must be DENIED.

THUS DONE AND SIGNED, in Chambers, in Shreveport, Louisiana this 22nd day of December, 1955.

/s/ Ben C. Dawkins, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B-2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16154

HARLAN F. LESTER,
Appellant,

versus

AETNA CASUALTY & SURETY COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(January 25, 1957.)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HUTCHESON, Chief Judge: Brought against defendant-appellee as the insurer of Dr. Edith W. Rigsby, a physician specializing in the practice of psychiatry, the suit was for malpractice and for the damage alleged to have resulted therefrom.

After a lengthy trial at which many witnesses testified, the cause was submitted to a jury upon a full and comprehensive general charge to which plaintiff took only three exceptions.[1]

There was a verdict and judgment for defendant, and plaintiff has appealed. Filing a statement of points [2]

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1 These are: (1) "I except to that part of the charge relating to consent and in which the court has said the jury may find that the full disclosure of the wife may stand in lieu of disclosure to the husband. The basis of my ground of objection is that it is unconstitutional in that it deprives the plaintiff of due process of law in that it deprives him of his liberty and freedom of contract and it violates the 14th Amendment of the United States Constitution and Article 1, Section 2 of the Constitution of Louisiana."

(2) "With respect to the use of X-rays by psychiatrists, I object to the court's charge with respect to the use of X-rays for determining injury as limiting it to the practice of psychiatrists rather than to the practice of physicians and surgeons in general, or physicians specializing in injuries to the bones."

(3) "I object to the failure of the court to give instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, as requested by plaintiffs."

2 "(1) The court erred in instructing the jury on the question of consent by plaintiff to sumbit to the treatment administered by defendants' assured.

"(2) The court erred in instructing the jury that: 'While it is basic in Anglo-American law that in the ordinary situation the patient in control of his mental faculties himself must be fully advised and must give his consent to any operation or other medical procedure which might produce harmful results, if you find from a preponderance of the evidence that it is a commonly accepted, proper and preferable practice among qualified psychiatrists practicing in this or other similar localities, not to disclose the possibilities to the patient, and that it is in the best interest of the patient that the matter be handled in such fashion, and if you further find that such a practice is reasonable generally and was reasonable in his case, and that an adequate explanation of the possible harmful results was given to plaintiff's wife, who consented for him, then you may not find for plaintiff on the ground that there was no valid consent given to the administration of the shock treatment by Dr. Rigsby, and your verdict should be for defendant, unless liability otherwise is established.' "

"(3) Under the courts charge to the jury on the question of consent, the jury was free to find as a matter of law, that

under Rule 75(d) F.R.C.P., limiting the appeal to a single question thus stated in his frief:

> "Under the law of Louisiana, considered in the light of the provisions of that state's constitution and of the parallel provisions of the Federal Constitution, can an adult human being be deprived of his full freedom to contract and therefore of his liberty without due process of law?"

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plaintiff could be deprived of his liberty (to contract—to consent to or refuse the proposed treatment acteually rendered) without due process of law by a physician engaged in private practice, provided plaintiff's spouse consented to or joined in such deprivation which charge was erroneous and prejudicial, and constitutes an invasion of plaintiff's rights under the 5th and 14th Amendments to the Constitution of the United States and under Article I, Section 2 of the Constituion of the State of Louisiana."

"(4) The court erred in refusing to give the instructions requested by plaintiff numbered VI; VII-A.B.C. and D.; VIII; IX; XI; XII."

These, as appellant states in his brief at page 41, "simply ask the court to charge the jury:

'(1) That every adult human being of sound mind has a right to determine what shall be done with respect to his own body. (Requested charge No. XII.)'

'(2) That every adult is presumed to be sane and capable of contracting for himself. (Requested charge No. VII-A.)'

'(3) That the burden of overcoming this presumption and of proving incapacity rests upon the person asserting it. (Requested charge No. VII-B.)'

'(4) That even if plaintiff was incompetent (by reason of insanity or otherwise) his wife could not contract for him, in the absence first of interdiction, and second, appointment and qualification as curatrix. (Requested charge No. VII-D.)'

'(5) That in order to perform a dangerous operation upon a patient the doctor must have the patient's consent. (Requested charge No. VII.)'

'(6) And that consent means informed and understanding consent, free of misrepresentation or concealment. (Charges No. VI, VIII, IX, XI, and XII.)' "

he filed a correspondingly limited designation of contents of the record on appeal.[3]

The defendant, in its turn, designated the entire remaining record not designated by plaintiff, including more than 1200 pages of testimony.

Here, confining himself to the points designated and insisting that "the charge of the court on the question of consent is erroneous and prejudicial as matter of law, under any conceivable circumstances or set of facts", and "the evidence in the case is utterly unrelated to the question of law raised by plaintiff's objections to the charge of the court on the question of consent or to the court's failure to charge on that question as urged by plaintiff in his requested charges". Appellant urges upon us that the giving of the instruction objected to and the refusal of the instructions requested was patent errors requiring a reversal.

In further emphasis of this insistence, appellant, stating in his brief that, for the reasons above stated, "we have deliberately foregone the very tempting luxury of quoting from or even referring to the evidence in this case," and moving under Rule 75(e) F.R.C.P. to impose upon defendant-appellee the costs of including in the record unessential matter, urges upon us that under the statement of points made, and relied upon by him, on the appeal, neither the evidence nor any part of the

[3] This consisted of the pleadings, the court's instructions to the jury, all plaintiff's objections to the court's charge to the jury on the question of consent, plaintiff's requested and refused instructions on the same issue, the verdict and judgment, the motion for a new trial and the order and opinion denying same.

record is necessary to a proper determination of the question of law propounded by him other than the portion of the record which he designated.

Appellee, citing and strongly relying on *Hall v. United States*, 136 Fed. Supp. 187, a malpractice case, affirmed Per Curiam, 334 F(2) 811, insists that its designation of the whole of the evidence and the record was reasonable and proper in order to show to this court that the facts in this case are the same as, or comparable to, the facts in the Hall case, and that the action of the court in giving and refusing the charges complained of here was in accord with the action of the trial court before which the Hall case was tried without a jury.

In view of appellant's claim that the action he complains of was erroneous "under any concievable circumstances or set of facts and the evidence in the case is utterly unrelated to the question of law" he raises, that, in short, for the purpose of this appeal this court may, indeed must, assume the existence of facts most unfavorable to plaintiff, we agree with its contention that defendant's designation in this case was a manifest violation of the invoked rule. Appellant's motion to tax against appellee the whole cost of compiling the record, except the portion designated by plaintiff, is therefore granted.

This is so because, under his statement of points and his designation of contents of record [4] on appeal, the

[4] Rule 75(a) (d) and (e), F.R.C.P., 28 U.S.C. pp. 223 et seq; Bennett v. Scofield (5 Cir.), 170 F(2) 887; Foremost Dairies v. Ivy, 204 F(2) 186; Persipka v. Elgin, 217 F(2) 182.

only matter appellant has brought here for our rveiew is his claim that under any conceivable state of facts or circumstances most unfavorable to him, which of course would include an assumed state as unfavorable as, or more unfavorable than, that actually shown by the evidence, the complained of action of the court, in giving the charges objected to, and in refusing those requested, on the issue of consent was prejudicial error.

As appellant correctly points out in his brief, his specifications of error upon the refusal of requested instructions are not intended to add to or enlarge upon his primary specifications 1, 2, and 3, dealing with the complained of error in the general charge. They are put forward to point up and emphasize by their particularization the error generally relied on, and it will not be necessary for us to, we will not, deal separately with them. It will be sufficient to say of them that the determination in favor of, or against, appellant of his primary grounds of error necessarily determined against him these subordinate and illustrative grounds.

Coming then to a consideration of appellant's claim of error on the record brought up by him in support, we are constrained to hold, for the reasons hereafter briefly stated, that no showing of prejudicial error is made and that the judgment must be affirmed.

Assuming, as we must in support of the verdict and judgment, that plaintiff's condition was such as to require neuro-psychiatric treatment and, in the judgment of his physician and his wife, to make it unsafe and un-

wise to require him to undergo the strain and shock of discussing and considering the possible, though not probable, hazards involved in, and making a decision as to, whether in view therof the electro-convulsive or electro-shock treatments prescribed for, should be administered to, him; that, in the judgment of his physician and his family it was desirable, indeed necessary that they be administered; and that his wife, being advised of and fully comprehending the situation, added to his consent already given her consent to the administration of the treatments, we are bound to hold that if further consent than that already given by plaintiff to their administration was needed, the wife could and did give sufficient legal consent, and that giving the complained of charge and refusing the requested charges was not prejudicial error. Any other conclusion would, we think, be contrary not only to human experience and sound reason but to the teachings of our case of *Wall v. Brim*, 138 F(2) 478 and the cases cited in it.

Appellant, himself recognizing the place, the responsibility, and the authority of a man's wife in familial situations of this kind, pleaded that complainant's injuries were the result of the negligence and want of proper skill and care on the part of the insured " * *and (d) *in failing to advise plaintiff's wife of the radical and dangerous nature of the prescribed treatment and in administering same without so advising her*" and the court in its charge, without specific objections thereto or complaint thereof by plaintiff, stated the pleadings as thus charging, and submitted to the jury whether in fact plaintiff's wife had been so informed and had consented. (Emphasis supplied.)

The basic, the fundamental, difficulty which confronts plaintiff on this appeal is that he presents his case as though it were one of a person being deprived by another of due process of law, instead of grounding it upon the well settled principles that a physician must, except in real and serious emergencies, acquaint the patient or, when the circumstances require it, some one properly acting for him, of the diagnosis and the treatment proposed, and obtained consent, thereto express or implied, and, consent obtained must proceed in accordance with proper reasonable medical standards and in the exercise of due care. Instead, in short, of dealing with the case in the light of the facts as they are and must be assumed to be: that the plaintiff went to the psychiatrist upon the advice and directions of his own personal physician, and, having solicited her medical skill and aid, was advised that the diagnosis indicated the use of electro-shock therapy or shock treatments; and that, without objection or question, he assented thereto; appellant argues the matter as though the treatments had been administered to him without his knowledge and consent legally and properly given by him or his wife for him. *Barfield v. South Highland*, 68 So. 30.

Appellant cites no case from any court in support of his position. We have found none. It has been, we think, correctly said. "Law is nothing else than reason". We think it clear in the light of reason that, under the verdict of the jury, though the result of the treatments is regretted by all, there has been no violation or breach of contract, no assult or battery, no negligence, no breach of obligation, but only a lamentable and unfortunate acci-

dent, an accident, according to the verdict of the jury, not the result of the failure of defendant's insured to exercise skill, prudence, good judgment and proper care or to proceed in any manner contrary to law.

The judgment is AFFIRMED.

A True Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX B-3

HARLAN F. LESTER

vs.

AETNA CASUALTY & SURETY COMPANY

No. 16,154

ORDER DENYING REHEARING

Extract from the minutes of March 1, 1957.

It is ordered by the Court that the petition for rehearing filed in this cause be and the same is hereby denied.

APPENDIX C

Article 1, Section 2, Louisiana Constitution of 1921

Sec. 2. Due process; expropriation of private property for public purposes; just compensation

"Sec. 2. No person shall be deprived of life, liberty or property except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

Amendment V — Constitution of United States

"Criminal actions — Provisions concerning — Due process and just compensation clauses.

"No person shall . . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV—Constitution of United States

Sec. 1. Citizenship — Due process of law — Equal protection.

". . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FILED
JUN 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1021

HARLAN F. LESTER,
Petitioner

vs.

AETNA CASUALTY & SURETY COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RICHARD H. SWITZER
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1605 Slattery Building
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LECOMTE, SHREVEPORT, LOUISIANA

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BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

It is urged by petitioner that there are two questions presented for resolution upon his application for writs, they being:

(1) Whether an adult citizen, not insane, may be deprived of his liberty and subjected to medical procedure by a privately practicing physician without his consent, and,

(2) Whether such action deprives the citizen of his liberty without due process of law. (Petition for writs, pages 2 and 3).

It is respectfully submitted that neither of these questions are actually presented nor are they in any wise involved in this case, nor were any such questions at issue either in the District Court or the Court of Appeals.

Discussing these questions in inverse order, it is well settled law that the Fifth and Fourteenth Amendments to the Constitution of the United States have no application to private individuals. They are restraints upon the powers of the Federal Government and the various states. Any action, not sanctioned by an act of Congress or an act of a legislature, does not come with the restraints of either the Fifth or Fourteenth Amendments. Since the action of which petitioner complains was the act of an individual acting in an individual capacity, the mentioned amendments are without application. *Jones v. Buffalo Creek Coal & Coke Co.*, 245 U.S. 328, 38 S. Ct. 121, 62 L. Ed. 325; *Ex Parte Commonwealth of Virginia*, 100 U.S. 313, 25 L. Ed. 667; *Barney v. City of New York*, 193 U.S. 430, 48 L. Ed. 737. In the second of the cited cases, this Court said:

> "The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals."

It is petitioner's complaint that being emotionally and mentally upset, he was referred by his private physician to a psychiatrist for psychiatric treatment and that the psychiatrist subjected him to electric shock treatments without his knowledge and consent. It is on this basis that petitioner claims he was deprived of his liberty

of contracting since he was not informed by the psychiatrist of the treatment and the possible effects thereof. Petitioner further urges that the consent of his wife was not his consent since she had no authority to consent for him.

This complaint is frivolous. It is a quarrel with the findings of fact by the jury which decided that petitioner was informed of the treatment to be given and that he personally consented thereto. This petition presents only a question of fact which petitioner contends the jury should have decided differently than it did.

In support of his contention that he was subjected to treatment without his consent, petitioner quotes at pages 5, 6, 7, and 8 of his petition certain allegations contained in his complaint presented to the District Court. The record in this case reveals that each of these allegations was categorically denied by the defendant and that the allegations contained in Article 2 of his amended complaint, quoted in full on page 6 of the petition for writs, was not only categorically denied by the defendant, but the defendant in its answer to the complaint affirmatively alleged that the complainant did consent to the administration of the shock treatments (R. 30). If further verification be necessary the ruling of the District Judge in overruling petitioner's motion for a new trial shows that "obviously, the jury disbelieved plaintiff, in his claim that the doctor told him she was going to administer 'lecture' treatments and believed the doctor's testimony that she told him she would give him electric shock treatments" (R. 1329).

It is urged by petitioner, patently as an afterthought, that his wife could not act for him, (although the record shows she was specially appointed as his agent to act for him) and that the allegations of his complaint that his wife was not informed by the doctor were for the purpose of anticipating a defense. It appears late in the day for such a contention to be made for the first time in petitioning this Court for writs.

In *Jones v. Buffalo Creek Coal and Coke Co.*, supra, it appears that this Court has decided the questions sought to be presented by petitioner, adversely to him. There certain titles from the State of West Virginia were offered in evidence and received by the Court over the objection of the defendants. The action of which defendants complained as depriving them of due process of law was the admission into evidence by the Trial Judge of the records and papers in three proceedings brought in the State Courts of West Virginia. This Court disposed of the contention there made in the following words:

> "As the action now complained of is not the action of a state, the 14th Amendment can have no application. And the claim that the action of the court violates the 5th Amendment is likewise unfounded."

So it is here. The action of the District Judge in his charge to the jury was not the action of the Federal Government under the Fifth Amendment nor the action of the State of Louisiana under the Fourteenth Amendment. The charge of the Judge was correct; it properly enunciated the law; it was approved by the Court of

Appeals. But, if for the sake of argument, it be conceded that the Judge committed an error of law in charging the jury as he did and that this error was compounded by the action of the Court of Appeals in approving it, even that is not a deprivation of due process of law. If the erroneous decision of a Court is a denial of due process then this Court would be required to review the decisions of all of the Courts of last resort of each state of the Union and every decision rendered by the various Courts of Appeals of the United States to determine whether they were correctly decided. That is not what due process means.

The rule is succinctly stated in *12 American Jurisprudence*, § 577, Pages 274, 275, that an erroneous decision does not necessarily violate the due process guaranty has been applied to errors in a charge to the jury in a criminal case and many other examples therein quoted.

Lastly, in confirmation of the proposition that petitioner is quarreling with the findings of fact of the jury, the Court of Appeals found that petitioner did consent to the administration of the treatments, which was only confirmed and added to by the consent of his wife. *Lester v. Aetna Casualty & Surety Company*, 240 F. 2d 676, at page 679.

It is urged at page 17 of the petition that the Court of Appeals has decided an important state question in conflict with applicable state law and so far sanctioned a departure from the accepted and usual course of judicial

procedure as to call for the exercise of this Court's power of supervision, but petitioner fails to point out the application of such contention. Not only did the Court of Appeals not decide an important state question in conflict with applicable state law but decided in strict conformity therewith. The second reason advanced by petitioner is simply a general assertion seeking to bring the case within those considerations set forth in Rule 19 of the Rules of the Supreme Court which govern review on certiorari and without in any way pointing to any departure from accepted and usual course of judicial proceedings.

Trial of this case took nine trial days. Petitioner received every consideration at the hands of the District Court; the District Court properly charged the jury; the jury found the facts against petitioner, and the Court of Appeals affirmed. There is nothing in petitioner's case calling for supervision by this Court; nothing of general application and nothing of importance in the application of the laws of the United States or of the State of Louisiana. This is simply another damage suit where the plaintiff failed to prevail and presents no unusual questions, no questions of constitutional law and no questions of supreme importance, and this despite the camouflage thrown around it by petitioner in his application to this Court for writs.

It is respectfully submitted that the decision of the Courts below are in harmony with the decisions of the Supreme Court and other Courts of Appeals, and with

the Courts of Louisiana; no question of public importance is presented and the decision complained of is in full accord with applicable local law.

It is, therefore, submitted that the petition for writs of certiorari in this case should be denied.

Respectfully submitted,

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Attorney for Respondent

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